

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN

&

THE HONOURABLE MR. JUSTICE V.K.MOHANAN

WEDNESDAY, THE 21ST NOVEMBER 2007 / 30TH KARTHIKA 1929

Ex.FA.No. 26 of 2006()

AGAINST THE ORDER DATED 16/08/2006 IN EA.606/2004 IN E.A.440/2004
IN OS.20/1998 of PRINCIPAL SUB COURT,KOCHI
.....

APPELLANT/PETITIONER:

SAVIOUR, S/O. JOHN,
MATTUPURATHU HOUSE, 11/855-A, AZHIKKAL,
MURIKKUMPADAM,PUTHUVYPE VILLAGE, KOCHI TALUK.

BY ADV. SRI.JOSE JOSEPH ARAYAKUNNEL
SRI.VARGHESE PARAMBIL
SRI.R.SIVASANKAR RAO

RESPONDENTS: RESPONDENTS:

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1. E.V. MATHAI,
ELAMKUKNNAPUZHA HOUSE, NJARAKKAL P.O.,KOCHI TALUK.
 2. ROBERT, S/O. JOHN,
MATTUPURATHU HOUSE, VADUTHALA P.O.,ERNAKULAM DIST.
 3. BINOY, S/O. SUDHAKARAN,
KATTUPADATH HOUSE, THEKKENMALIPURAM.

R3 BY ADV. SRI.BABU KARUKAPADATH
SRI.JAGAN GEORGE

R1 BY ADV. SRI.S.VINOD BHAT
BY ADV. SRI.R.D.SHENOY (SR.)
SRI.S.VINOD BHAT

THIS EXECUTION FIRST APPEAL HAVING BEEN FINALLY HEARD
ON 14-11-2007, THE COURT ON 21-11-2007, DELIVERED THE FOLLOWING.

ORDER ON I.A.NO. 1795/2006 IN EXFA 26/2006
DISMISSED.

21-11-2007. SD/- P.R.RAMAN, JUDGE.
SD/- V.K.MOHANAN, JUDGE.

//TRUE COPY//

P.R.RAMAN & V.K.MOHANAN,JJ . (C.R)

Ex.F.A. No.26 of 2006.

Dated 21st November, 2007.

JUDGMENT

Mohanan,J.

The applicant in E.A.No.606/2004 in E.A.440/2004 in E.P.No.58/2003 in O.S.No.20/1998 is the appellant herein who challenges the order dated 16-8-2006 of the Principal Sub Court, Kochi by which the application filed by the appellant/petitioner under Order XXI Rule 101 read with Section 151 of C.P.C. was dismissed with costs holding that O.S.No.134/2001 was a suit collusively filed by him against his brother who is the 2nd respondent in the above application and further found that he has no title or interest over the petition schedule property under the sale conducted in E.P.55/2002 in O.S.134/2001. It is the above order and finding are impugned in this appeal.

2. The averments and claim of the appellant/petitioner are as follows:

The appellant and 2nd respondent entered into a sale

agreement on 10-8-1997 for the sale of 4 cents of property including house bearing No.11/855 A situating in survey No.1077/1 of Puthuvypu village for a total consideration of Rs.3,60,000/- out of which Rs.15,000/- was paid as advance on the date of agreement itself. It is the further case of the appellant that as per the endorsement dated 9-12-1997, the period of the agreement was extended for a further period of 2 years for execution and registration of the documents. It is also averred that on 9-12-97, the appellant had paid the entire balance amount towards consideration to the 2nd respondent as the 2nd respondent was in absolute need of money to meet his urgent demand. The appellant says that the 2nd respondent failed to perform his part of the contract which constrained the appellant/petitioner to file O.S.134/2001 before the Sub Court, Kochi for specific performance and the said suit was decreed with a charge over the property. Since the said decree was not satisfied, the appellant/applicant has preferred E.P.55/2002 for execution of the decree, the decretal amount being calculated as Rs.4,03,472/-. Since no amount

was paid, the petition schedule property therein, on which there was a charge as per the decree, sold in court auction on 25-2-2003 and in the said auction, the appellant/applicant participated and he bid the auction. The sale was confirmed on 26-6-2003 and the appellant had obtained sale certificate on 29-10-2003. Thereafter, as per the order in E.A.3/2004 in E.P.55/2002 in O.S.134/2001, the appellant/applicant has obtained delivery of the property and thus he is the absolute owner of the petition schedule property and he is in possession of the same. Thereafter, he was paying tax and he had telephone connection to the said house and he was paying electricity charges regularly and thus according to the appellant/applicant he was fully enjoying the property as he has got absolute ownership and possession without any interference from any corner and the appellant/applicant was not aware of any case relating to the petition schedule property till 5-11-2004.

3. It is the further case of the appellant that only on 6-11-2004 he came to know about the execution application

No.440/2004 in E.P.No.58/2003 in O.S. 20/98 when Ist respondent filed application for delivery of the petition schedule property. Immediately thereafter, he approached the court below by filing E.A.606/2004 under Order XXI Rule 101 read with section 151 of CPC with a prayer to allow the claim petition contending that he is in absolute ownership and possession over the petition schedule property for the reasons stated in the affidavit accompanied thereto. He placed reliance on the sale certificate as per the order in E.P.55/2002 in O.S.134/2001 with respect to the whole property including House No. 11/855 A and the aforesaid land property situated in Survey No.1077/01 of Puthuvypu village.

4. The Ist respondent filed a detailed counter statement controverting the claim and averments put forwarded by the appellant in his claim statement. According to the Ist respondent, the 2nd respondent is the brother of the appellant/applicant and the decree in O.S.134/2001 was obtained in collusion and fraud. It is stated that the brother of the appellant namely, 2nd respondent was ex parte in

O.S.134/2001. It is also stated that O.S. 134/2001 was filed long after the decree in O.S.20/98. It is also averred that the appellant/applicant who was the plaintiff in O.S.134/2001 which was filed after filing E.P.58/2003 in O.S.20/98. It is further stated that the Ist respondent bid the petition schedule property in court auction on 7-10-2003 in E.P.58/2003. He had categorically stated that the 2nd respondent did not mention anything about O.S.134/2001 in the proceedings in E.P. 58/2003 in O.S.20/98. Ist respondent has also stated that he had deposited 25% of the auction price in E.P.58/2003 and paid a sum of Rs.1,50,000/- towards the balance amount on 20-10-2003. Accordingly, the said sale in E.P.58/03 was confirmed on 16-12-2003. Thus he filed E.A.406/2004 for delivery of the property.

5. A separate counter statement was filed by the 2nd respondent wherein he had admitted that the appellant/applicant is his brother. He had also admitted the agreement dated 9-12-97. It is also stated that the appellant/applicant has filed O.S.134/2001 against him. He

had denied the allegation of collusion or fraud between himself and the appellant. It is categorically stated that the sale agreement was prior to the transaction between the 2nd respondent and 3rd respondent. It is also stated that 2nd respondent has filed I.P. 2/2001 and 3rd respondent was aware of it. According to 2nd respondent, the 3rd respondent filed execution petition suppressing all those facts.

6. The 3rd respondent has also filed a counter statement. In the said statement, he had stated that the appellant/applicant and 2nd respondent are brothers. He had denied the sale agreement alleged to have entered into between the appellant/applicant and the 2nd respondent. It is also stated that the appellant was not having financial capacity to pay the alleged sale price. It is claimed that 2nd respondent has borrowed money from several persons including himself. It is the specific case of the 3rd respondent that he had filed O.S.28/98 and obtained an order of attachment of property as per I.A.162/98 in O.S.20/98 which was ultimately decreed against the 2nd respondent and he had

filed E.P.58/03 for realisation of the decree amount by sale of property of the 2nd respondent. It is also stated that in the execution petition 2nd respondent entered appearance and deposited a sum of Rs.20,000/- and also filed objection to Rule 66 notice. It is the specific case that 2nd respondent in his objection to Rule 66 notice or in the indigent petition did not mention about the sale agreement. According to the 3rd respondent, the property was sold in court auction on 7-10-2003 after complying all the formalities required by law. Ist respondent bid the property in court auction on 2-1-2003 and thereafter 2nd respondent filed E.A. 373/2003 to set aside the sale and that petition was dismissed and sale was confirmed. It is also stated that 3rd respondent had filed C.A.111/2004 on 3-1-2004 for the issuance of cheque for return of the deposit amount. The notice to the 2nd respondent in the above cheque application was issued in the address of the petition schedule property and the same was refused by the 2nd respondent and returned. Thus according to the 3rd respondent, even the very filing of O.S.134/2001 and the

execution petition thereon and the delivery etc. are made fraudulently and in collusion and the sole intention behind it was to defeat the decree in O.S. 20/98. It is specifically averred that the appellant/applicant was fully aware of the entire proceedings in O.S.20/98 and he colluded with 2nd respondent who is none other than his brother and the sale in E.P.58/2003 was conducted by complying all the statutory formalities and therefore the appellant/applicant has no right or possession over the petition schedule property.

7. During the course of enquiry and evidence, on the side of the appellant/applicant, Exts.A1 to A4 were marked as documentary evidence and examined the appellant himself as PW-1. On the side of the respondents, RWs-1 and 2 were examined and documentary evidence were marked as Exts. B1 to B8.

8. The court below has formulated 6 points for its consideration. In answer to points Nos.1 to 3, the court has held that the present application ought to have been filed

under Order XXI Rule 99 of C.P.C. instead of invoking the provisions under Order XXI Rule 101 read with Section 151 CPC and the Court has the power to decide all questions relating to title and interest of the parties over the property in applications filed under Order XXI Rule 97 and 99. The court below has found that sale in E.P.58/2003 in O.S.20/98 took place after the sale in E.P.55/2002 in O.S.134/2001 and also found that the disputed property has been attached in O.S. No.20/98 as per order in I.A.162/98 long prior to the filing of OS 134/2001. Therefore according to the court below, the sale in E.P.55/2002 in O.S.134/2001 was conducted at a time when the order of attachment in O.S. 20/98 was in force. The court below also came into the conclusion that the decree for possession contemplated under Order XXI Rule 99 will be decree for recovery of possession, partition etc., in which it can be executed by applying for delivery of possession and therefore according to the court below, Order XXI Rule 99 has no application and the proper provision which ought to have been invoked is Order XXI Rule 58 of CPC. But according to

the court below, before filing the present application, the sale has already been taken place and therefore Order XXI Rule 58 cannot be invoked by the appellant/applicant. Hence, according to the court below, the remedy is only to file a separate suit to establish the title of the appellant/applicant over the disputed property. Thus the court below has held that the remedy of the appellant/applicant under Order XXI Rule 58 is already lost on account of the sale of the property and he has no right to come under Order XXI Rule 99 since the decree was not for possession. Thus, according to the court below, the application filed by the appellant/applicant is not maintainable.

9. After having considered certain circumstances discussed in the order, the court below found that there is some force in the arguments advanced on behalf of the contesting respondents regarding the genuineness of the agreement for sale set up by PW-1 and 2nd respondent. According to the court below, the appellant being the plaintiff in O.S.134/2001 is expected to seek for a decree for specific

performance of the contract as his case is that he had paid the entire consideration, but according to him, he is satisfied with the decree for recovery of money only and the said stand of the appellant seriously doubted by the court below especially in the absence of any explanation as to why he did not challenge the decree as per which the relief of specific performance is denied. Therefore, the above conduct of the appellant/applicant was suspicious and it is held that O.S.134/2001 is not a genuine suit. It is also held that PW.1-appellant/applicant and 2nd respondent being direct brothers and in the absence of anything to show that they were on inimical terms, the suit was filed in collusion and on the basis of such inference, the court has further gone to say that there will not be any difficulty for manipulating an agreement for sale as Ext.B3 and to mention the previous agreement and managed to get a decree in O.S.134/2001. Thus the court below came into the conclusion that O.S.134/2001 is a suit collusively filed by PW-1 and his brother, the 2nd respondent to defeat the decree holder in O.S.20/98 and held that the

petitioner/appellant has no title or interest over the petition schedule property under the sale conducted in E.P.55/2002 in O.S.134/2001 and thus the application/petition filed by the appellant was dismissed. It is the above finding and the order which is impugned in this appeal.

10. We have heard elaborately the counsel appearing for the parties in this appeal. The learned counsel appearing for the appellant has strenuously argued that the appellant is in absolute ownership and possession of the petition schedule property through the sale conducted by the court. According to him, 3rd respondent as well as 1st respondent had suppressed the fact of earlier sale and delivery of the property in favour of the appellant. According to the counsel, the factum of existence of O.S.134/2001 and the charge decree based on which the subsequent sale and delivery of the property to the appellant are not at all in dispute. According to the counsel, the only case of respondents 1 and 3 in O.S.134/2001 is that the decree thereon was obtained fraudulently and collusively and therefore the same is not

binding on them. According to the counsel, the finding of the court below that the decree in O.S.134/2001 was obtained by fraud and collusion are based upon conjectures and surmises. He has also argued that the finding of the court below that the appellant should have filed a claim under Order XXI Rule 58 of C.P.C. is incorrect and further argued that the court below is bound to entertain the application under Order XXI Rule 99 and also further assailed the finding of the court below that the only remedy open to the appellant is to file a separate suit. The counsel appearing for the respondents vehemently opposed the appeal and argued that the appellant/applicant got the decree collusively and fraudulently and therefore whatever objection raised by him against the execution of the decree in O.S.20/98 are not sustainable and thus supported the impugned order of the court below.

11. The appellant/applicant when approached the court below, though he filed E.A.606/2004 in E.A.440/2004 under Order XXI Rule 101 read with section 151 C.P.C, *the prayer was to allow his claim after having found that he is having*

absolute ownership and possession over the petition schedule property, namely, the house bearing No.11/855 A and 4 cents of property situating in Sy.No.1077/1 of Puthuvypu village as he has got sale certificate as per the auction sale in E.P. 55/2002 in O.S.134/2001. If a person approached the court below with such prayer, what is the duty and jurisdiction of the court, is the question to be answered in this appeal. Though it is disputed, the claim as on the date of the impugned order is that the appellant/applicant has got absolute ownership and possession over the petition schedule property as per the sale conducted at the instance of the execution court on 25-2-2003 and that the said sale was confirmed on 26-6-2003 and the sale certificate was issued on 29-10-2003. It is the further case of the appellant/applicant that he had filed E.A.3/2004 for delivery and thus he was in absolute possession and ownership over the property in question and he had paid building tax, electricity charges and even he has got telephone connection to the said house. Of course, there is dispute regarding the

mode of obtaining the decree and the suit and also regarding the agreement which is the subject matter in O.S.134/2001. But the subsequent development which is discernible from the earlier mentioned facts would show that his claim is a genuine one and the same has to be entertained and a just and proper decision has to be taken on such claim. At this juncture, it is relevant to note that in view of the mandatory provisions contained in Section 47 of CPC, the execution court has got a duty to determine all questions relating to the execution, discharge or satisfaction of the decree and a separate suit is specifically barred for deciding the above issues. If that be so, the appellant/applicant has no other option but to approach the court below by invoking Order XXI Rule 99 of CPC. But the court below went wrong in holding that either Rule 58 or Rule 99 of Order XXI cannot be invoked by the appellant/applicant since his claim was preferred after the sale of the property and the decree mentioned in Rule 99 is a decree for the possession of such property. But in the present case, the decree is not for possession. The above finding of

the court below is absolutely unfounded, illegal and unsustainable. The court below ought to have construed the above provisions in the light of the mandatory nature of the provisions and the specific bar contained in section 47 of C.P.C. In the decision reported in **Brahmdeo Chaudhary v. Rishikesh Prasad Jaiswal** (AIR 1997 S.C 856), the Apex Court has held:

“In short the aforesaid statutory provisions of Order XXI lay down a complete code for resolving all disputes pertaining to execution of decree for possession obtained by a decree-holder and whose attempts at executing the said decree meet with rough weather. Once resistance is offered by a purported stranger to the decree and which comes to be noted by the Executing Court as well as by the decree-holder the remedy available to the decree holder against such an obstructionist is only under Order XXI, Rule 97 sub-rule(1) and he cannot by-pass such obstruction and insist on re-issuance of warrant for possession under Order XXI, Rule 35 with the help of police force, as that course would amount to by-passing and circumventing the procedure laid down under Order XXI, Rule 97 in connection with removal of obstruction of purported strangers to the decree. Once such an obstruction is on the record of the Executing Court it is difficult to appreciate how the Executing Court can tell such obstructionist that he must first lose possession and then only his remedy is to move an application under Order XXI, Rule 99 CPC and pray for restoration of possession. The High Court by

the impugned order and judgment has taken the view that the only remedy available to a stranger to the decree who claims any independent right, title or interest in the decretal property is to go by Order XXI, Rule 99. This view of the High court on the aforesaid statutory scheme is clearly unsustainable. It is easy to visualise that a stranger to the decree who claims an independent right, title and interest in the decretal property can offer his resistance before getting actually dispossessed. He can equally agitate his grievance and claim for adjudication of his independent right, title and interest in the decretal property even after losing possession as per Order XXI, Rule 99. Order XXI Rule 97 deals with a stage which is prior to the actual execution of the decree for possession wherein the grievance of the obstructionist can be adjudicated upon before actual delivery of possession to the decree-holder. While Order XXI, Rule 99 on the other hand deals with the subsequent stage in the execution proceedings where a stranger claiming any right, title and interest in the decretal property might have got actually dispossessed and claims restoration of possession on adjudication of his independent right, title and interest dehors the interest of the judgment-debtor. Both these types of enquiries in connection with the right, title and interest of a stranger to the decree are clearly contemplated by the aforesaid scheme of Order XXI and it is not as if that such a stranger to the decree can come in the picture only at the final stage after losing the possession and not before it if he is vigilant enough to raise his objection and obstruction before the warrant for possession gets actually executed against him.

xx	xx	xx	xx
xx	xx	xx	xx

It is further held in the decision:

“On the contrary the statutory scheme envisaged by Order XXI, Rule 97 CPC as discussed earlier clearly guards against such a pitfall and provides a statutory remedy both to the decree-holder as well as to the obstructionist to have their respective say in the matter and to get proper adjudication before the Executing Court and it is that adjudication which subject to the hierarchy of appeals would remain binding between the parties to such proceedings and separate suit would be barred with a view to seeing that multiplicity of proceedings and parallel proceedings are avoided and the gamut laid down by Order XXI, Rules 97 to 103 would remain a complete code and the sole remedy for the concerned parties to have their grievances once and for all finally resolved in execution proceedings themselves”.

12. Thus it can be seen that one of the course open to the appellant is to invoke Rule 99 of Order XXI of C.P.C. But the court below took a stand which is diametrically opposed to the statutory provision. In order to come into a conclusion that Rule 99 of Order XXI is not applicable in the present case, the court below very much relied upon the first limb of the Rule 99, namely as quoted by the court below, “holder of a decree for the possession of such property”. The remaining portion of Rule 99 of Order XXI has been neglected by the court which

says: "or, where such property has been sold in execution of a decree by the purchaser thereof, he may make an application to the Court complaining of such dispossession". In the light of the above decision, it can be seen that the aggrieved person need not wait till he is physically dispossessed from the property. If that be so, the appellant has rightly approached the court below against the dispossession and with a prayer *"to allot his claim after having found that he is having absolute ownership and possession over the petition schedule property, namely, the house bearing No.11/855 A and 4 cents of property situating in survey No.1077/1 of Puthuvyppu village as he has got sale certificate as per the auction sale in E.P.55/2002 in O.S.134/2001"* and certainly, the court below ought to have consider his claim and to dispose of the same in accordance with law and on merits. But instead of taking such a stand, the court below went on a footing that such a petition is unsustainable. We are unable to endorse the above approach and the finding of the court below.

13. Without an elaborate analysis upon evidence it is

also not correct to say that the appellant cannot invoke Rule 58 of Order XXI of CPC. In E.P.58/2003 in O.S.20/98, the auction sale was on 7-10-2003, but in O.S.134/2001, auction sale was on 25-2-2003. The confirmation of sale in OS 134/2001 was on 26-6-2003 whereas in O.S 20/98, the confirmation was on 16-12-2003. So, as per the above datas, one can come into a safe conclusion that the sale of the petition schedule property in favour of the appellant/applicant was taken place much prior to the date of sale in favour of Ist respondent. According to the appellant/applicant, the agreement for sale which is the subject matter of OS 134/2001 was on 10-8-97 and the period for executing the document was extended to 2 years as per the agreement dated 9-12-97 as evidenced by Ext.B3. According to respondents 1 and 3 the sale agreement was entered into with a view to defeat the outcome in O.S. 20/98. However all these aspects are to be proved and a finding is yet to be arrived on the basis of evidence and materials to be adduced. Therefore, the finding of the court below at this stage that Order XXI Rule 58 is not

available to the appellant, is not correct. In paragraph 16 of the impugned judgment, the court below has held that Order XXI Rule 58 cannot be invoked since before filing the present application by the appellant, the sale has already been taken place and further found that the appellant/applicant cannot invoke Order XXI Rule 99 of CPC as the same is not sustainable and the court below has suggested that the remedy is only to file a suit to establish the appellant's title over the property. The above suggestion is opposed to the statutory bar contained in Section 47 of C.P.C. Therefore, especially in the light of the judgment of the Apex Court, in **Brahmdeo Chaudhary's** case (AIR 1997 SC 856), we are of the opinion that the appellant's remedy is only under Order XXI Rule 99 C.P.C. and the court is bound to entertain such petition and to take a decision on merits on the basis of the evidence and materials adduced by the parties.

14. Without proper evidence and appreciation of the facts involved in the case, the court below came into the conclusion that the objection and claim raised by the appellant

is devoid of any merit as according to the court below, O.S.134/2001 is a suit filed collusively by PW-1-the appellant/applicant against his brother-2nd respondent to defeat the decree holder in O.S 20/98 and thus found that the appellant has no title or interest over the petition schedule property and accordingly, the petition was dismissed. In order to come into the above conclusion and decision, the court below very much relied on the following circumstances, viz., the appellant/applicant who is PW-1 and the 2nd respondent are brothers, who are the parties in O.S.134/2001, since full consideration has already been paid and no other formalities were yet to be complied, there was no need to extend the period of agreement, the appellant/applicant and 2nd respondent miserably failed to challenge the plea; that 2nd respondent in paragraph 4 of Ext.B8 written statement has stated that there is no other agreement and therefore according to the court below, all claims based upon the agreement which is the subject matter of O.S 134/2001 are false, based upon Exts.B1 and B2 the court below is of the

opinion that the non-production of the agreement therein shows that the plea behind the agreement etc. are false and it was a suit filed in collusion, according to the court, Ext.B5 is a copy, there was nothing mentioned in the agreement which is the subject matter of OS 134/2001. Thus according to the court below, the so called agreement dated 19-12-97, i.e. Ext.B3 is a manipulated document. Further, the court below doubted the stand of the appellant/claimant in his satisfaction with the decree for money only and for not asking the property. According to the court, since the brothers are not inimical terms, the suit might have been filed collusively and fraudulently. If the appellant was put in possession at the time of the transaction, there was no need for him to apply for delivery of property and, finally, another circumstance considered by the court below is that after filing the objection in E.P.58/2003, nothing was mentioned about the agreement etc. On the basis of the above mentioned circumstances, the court below came into the conclusion that OS 134/2001 was filed fraudulently and collusively with a view to defeat the

outcome in OS 20/98.

15. In the decision in **State of A.P. v. Suryachandra Rao** reported in {(2005) 6 SCC 149)}, the Apex Court held :

“By “fraud” is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from ill-will towards the other is immaterial. The expression “fraud” involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable, or of money, and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied”.

In the very same decision, after having considered the decision in **Chengalvaraya Naidu v. Jagannath** {(1994) 1

SCC 1}}, the Apex court has held that "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. In paragraph 10 of the above decision, the Apex court has further held that "an act of "fraud" on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata".

16. In this regard, it is relevant to note that according to the appellant, there was an agreement regarding the sale of the property even prior to the filing of O.S.20/98. Of course, the above agreement is in dispute, but the same has not been properly considered by the court below in resolving the dispute

in the present claim. Unless a thorough enquiry is conducted on all those facts and without evidence and materials, it cannot be said that whether it was a false claim regarding the agreement, especially, the agreements dated 10-8-97 and 9-12-97 in O.S.134/2001. In order to come into a definite conclusion regarding collusion and fraud with respect to the filing of O.S.134/2001, clear materials and concrete evidence are absolutely necessary. It is also important to note that merely because the appellant and 2nd respondent are happened to be brothers, no collusion or fraud can be inferred unless there are positive evidence and materials. Therefore, the finding of the court below in that respect is also not correct. Yet another point found by the court below against the appellant is that he was simply satisfied with a decree for money in O.S.134/2001, which is a suit for specific performance, instead of asking for a decree for specific performance at the instance of the court for obtaining the property. The plaintiff is the master of the plaint and it is for him to mould the relief and also to take steps if he is

unsatisfied with the decree or relief granted. In the present case, as revealed by the records, though the suit was for specific performance, a decree for money with a charge over the property was granted, which according to that court, was just and proper in the facts and circumstances of case and the plaintiff, according to his wisdom, has chosen to accept the decree. Nobody can find fault with such decision of the plaintiff/appellant.

17. In the present appeal, one of the grounds taken by the appellant is that the court below has committed wrong relying on conjectures and surmises for the conclusion of fraud and collusion; in obtaining the decree in O.S.134/2001. That finding is arrived even without calling for the records of the case file. A court of law cannot act upon a mere and vague averment regarding "fraud". Plea of "fraud" must be taken specifically and the same shall be substantiated with cogent evidence and materials. It appears that the court below proceeded on an understanding that the appellant's/applicant's case will not come within the purview of Order XXI Rule 99

and hence, by simply relying on the above circumstances, the court below came into an erroneous conclusion that O.S.134/2001 was filed with oblique motive and a decree thereon was obtained on fraud and collusion. We cannot support the findings. Therefore we are of the opinion that the court below has to reconsider the entire matter afreshly after giving opportunities to both the parties to raise their respective pleadings effectively and to advance evidence to substantiate such pleas. Appellant seeks for an opportunity to coproduce certain additional materials in support of their case. Since we are remitting the matter, an opportunity be given to the parties to produce additional evidence if they chose to file, and decide the case afresh considering the materials as well.

18. In the light of the above discussion, we are inclined to allow the appeal and accordingly, the order of the court below dated 16-8-2006 in E.A.606/2004 in E.A.440/2004 in E.P.58/2003 in O.S.20/1998 on the file of the Principal Sub Court, Kochi is hereby set aside and the matter is remanded to the court below for fresh consideration after giving

opportunities to the parties concerned.

In the result, the appeal is allowed and the parties are directed to bear their respective costs and they are further directed to appear before the court below on 3-1-2008.

P.R.RAMAN,JUDGE.

V.K.MOHANAN, JUDGE.

kvm/-

EXFA 26/06

-: 30 :-